No. 83-1513

IN THE

Supreme Court of the United States

October Term, 1983

MT. DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA,
Appellant,

vs.

TIMOTHY CURRAN,
Appellee.

On Appeal From the Court of Appeal of California Second Appellate District.

MOTION TO DISMISS.

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MOTION TO DISMISS.

Pursuant to Rule 16 of the Rules of this Court, Appellee moves to dismiss the appeal herein upon the ground that the appeal is not within this Court's jurisdiction and does not present a substantial federal question.

ARGUMENT.

The Proceedings Below.

This case is not yet at issue. Appellant's demurrer to Appellee's Amended Complaint was sustained by the Los Angeles Superior Court. The judgment of that Court was reversed by Division Seven of the California District Court of Appeal in an opinion printed as Appendix A to Appellant's Jurisdictional Statement (hereafter "Jurisdictional Statement"). Hearing was denied by the California Supreme Court without opinion (Jurisdictional Statement, App. E).

The Amended Complaint is set out in the Appendix hereof. It pleads two causes of action.

The First Cause of Action pleads that Appellee was arbitrarily expelled from Boy Scouts of America because he was a homosexual and thus, according to Appellant, not a good moral example for younger Scouts and could not have "Scouter" (adult leadership) status for which he had applied. This count also pleads that there is no membership requirement of Boy Scouts of America that a member may not be homosexual. It also incorporates into its pleading, as does the Second Cause of Action, Appellant's statement that "Boy Scouts is a private membership organization free to associate itself with, and to disassociate itself from, whomever it may choose."

No state statute is involved in the First Cause of Action. It is strictly a common law action stemming from *Dawkins v. Antrobus* (1881) 17 Ch.D. 615 and embodied in a long line of California cases beginning with *Otto v. Journeymen Tailors' Protective and Benevolent Union* (1888) 75 Cal. 308, 17 P. 217. The holding of the District Court of Appeal was that Appellee had "stated a valid claim for wrongful denial of the common law right of fair procedure in his first cause of action." (Jurisdictional Statement, App. 11a).

The Second Cause of Action was based upon the Unruh Civil Rights Act (Cal. Civil Code, §51). The applicable text of the Act states:

> "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever."

The District Court of Appeal considered the cases involving California's earlier public accommodations statute, the legislative history of the Unruh Act, and the California cases since its enactment in 1957 as well as the criteria established in other cases.[1] While the Court concluded that the Legislature was precluded from "enacting anti-discrimination laws where *strictly* [emphasis the Court's] private clubs or institutions are affected",[2] it held "that the concept of organizational membership per se cannot place an entity outside the scope of the Unruh Act unless it is shown that the organization is truly private."[3]

The Court's final conclusion was that:

> "We therefore conclude that the term 'business establishments', consistent with the Legislature's intent to use the term in the broadest sense reasonably possible, includes all commercial and non-commercial entities open to and serving the public. Accordingly, we hold

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[1] *Tillman v. Wheaton Haven Recreation Assn. Inc.* (1973) 410 U.S. 431; *Sullivan v. Little Hunting Park, Inc.* (1969) 396 U.S. 229; *Nesmith v. Young Men's Christian Assn.* (4th Cir. 1968) 397 F.2d 96; *Cornelius v. Benevolent Protective Order of Elks* (D. Conn. 1974) 382 F.Supp. 1182; *Wright v. Cork Club* (S.D. Tex. 1970) 315 F.Supp. 1143; *National Organization for Women v. Little League Baseball Inc.* (1974) 127 N.J. Super. 552, 318 A.2d 33 (Jurisdictional Statement, App. 18a-19a).

[2] Jurisdictional Statement, App. 17a.

[3] *Id.* 19a.

the Boy Scouts, of which the defendant is a part, is a business establishment within the meaning of the Unruh Act."[4]

No Final Judgment or Decree.

While for purposes of 28 U.S.C. 1257, the District Court of Appeal may here be "the highest court of [the] state", there has been no "final judgment or decree" rendered by it.

Appellant recognizes (Jurisdictional Statement, pp. 3-5) that there is no "final" judgment or decree in the accepted sense of the word. It then presents a two-pronged argument — the order of the Court is final because its opinion is the "law of the case", but if it is not final it comes within the exceptions, notably the fourth category, to the requirement of finality set out in *Cox Broadcasting Company v. Cohn*, 420 U.S. 469, 482-87 (1975) and re-enunciated in *Southland Corp. v. Keating*, ___ U.S. ___, ___, 52 U.S.L.W. 4131, 4133 (January 23, 1984).

We examine first Appellant's "law of the case" argument.

There was no opinion of the California Supreme Court here. Had the Supreme Court rendered an opinion which upheld the constitutionality of the Unruh Act as applied to Appellant there would, at least, have been a judgment or decree of the highest court of the state which, although not "final", still might serve as a basis for a determination of whether it came within an applicable *Cox Broadcasting* exception.

But even that is lacking here, for while the District Court of Appeal decision may be binding upon the California trial court and *generally* upon this particular division of the Court of Appeal of the Second Appellate District, it is, at most,

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[4]*Id.* 19a.

only persuasive upon the coordinate courts in the state. And although the coordinate courts of appeal may choose to follow the court below, they need not.[5]

Similarly, while the California Supreme Court may find the decision of the court below correct, it need not, and is not bound by it. The denial of a hearing by the California Supreme Court does not necessarily mean approval of the Court of Appeal's decision.

The denial of a hearing by the California Supreme Court "is not to be taken as an . . . affirmative approval by this court of any proposition of law laid down in such opinion [of the District Court of Appeal] . . . . The significance of such refusal is no greater than this — that this court does not consider that the interests of justice, or the purposes for which the power was given, require its exercise in the particular case." *People v. Davis* (1905) 147 Cal. 346, 350, 81 P. 718.

People v. Davis was decided by the California Supreme Court the year after the adoption of the 1904 amendment to Article VI of the California Constitution[6] and the Court

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[5]Witkin, *California Procedure* 2d Edition (1971) Vol. 6, p. 4580: "A decision of a court of appeal is not binding in the courts of appeal. One district or division may refuse to follow a prior district or division . . . ."

Swinerton & Walberg Co. v. Inglewood (1974) 40 Cal.App.3d 98, 101, 114 Cal.Rptr. 834: "This precise question has been answered in the negative by the Third District of this statewide court less than four years ago in *Rubino v. Lolli*, 10 Cal.App.3d 1059. That decision, of course, is not binding upon us."

Accord: *Estate of Toy* (1977) 72 Cal.App.3d 392, 396, 140 Cal.Rptr. 183; *Van Goalen v. Superior Court* (1978) 80 Cal.App.3d 371, 376; *People v. Yeats* (1977) 66 Cal.App.3d 874, 879, 136 Cal.Rptr. 243; *Theresa Enterprises v. David* (1978) 81 Cal.App.3d 940, 947, 146 Cal.Rptr. 802; *Bridges v. Bridges* (1978) 82 Cal.App.3d 976, 978, 147 Cal.Rptr. 471.

[6]Section 4 — "Supreme Court; jurisdiction. . . . the said [Supreme] court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a District Court of Appeal, which shall be ordered by the Supreme Court to be transferred to itself for hearing and disposition, as hereinafter provided."

pointed out (*Id.*), "We state this rule in this case because it is the first case which has come before this court upon an application for such a transfer [*i.e.*, hearing] and because we desire to lay down a precedent in order that parties concerned, as well as the district courts of appeal, may understand and appreciate their respective rights, duties, and responsibilities."

Even as to the Division of the Court of Appeal which rendered the decision, Witkin's *California Procedure* (2d Ed. 1971, Vol. 6, §650, p. 4568) states the applicable law as follows:

> "It has been seen that the later California decisions view the doctrine [of 'the law of the case'] as one of *policy* (emphasis in the text) only, to be disregarded when compelling circumstances call for a redetermination of the point of law determined on a prior appeal (see, *supra*, §636)."

In section 636 (p. 4555) under the heading "Modern Rule of Policy, Departure by Appellate Court", Witkin states:

> "The later decisions not only recognize several kinds of exceptions to the application of the doctrine (see *infra*, sec. 650, *et seq.*), but also reject the notion of limited power (*supra*, sec. 635) and treat the doctrine as merely one of policy and normal practice."

Witkin there refers to *England v. Hospital of Good Samaritan* (1939) 14 Cal.2d 791, 97 P.2d 813 as "The leading case stating the modern approach". In that case, the California Supreme Court set out the law as follows:

> "The doctrine of the law of the case is recognized as a harsh one (2 Cal.Jur. 947) and the modern view is that it should not be adhered to when the application of it results in a manifestly unjust decision . . . [A] court is not absolutely precluded by the law of the case from reconsidering questions decided upon a former

appeal. Procedure and not jurisdiction is involved." (p. 795.)

In *Messinger v. Anderson*, 225 U.S. 436 (1912) this Court stated (p. 444):

> "In the absence of statute, the phrase, 'law of the case', as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of the courts generally to refuse to open what has been decided, not a limit to their power."

The basic principle laid down in *England v. Hospital, supra*, has been followed consistently by the California Supreme Court in all aspects.

> ". . . [T]he doctrine of the law of the case . . . is merely a rule of procedure and does not go to the power of the court . . ." *DeGenova v. State Board of Education* (1962) 57 Cal.2d 167, 179, 367 P.2d 865, 18 Cal.Rptr. 369.

See also:

Gore v. Bingamen (1942) 20 Cal.2d 118, 120, *et seq.*, 124 P.2d 17;

Vangel v. Vangel (1955) 45 Cal.2d 804, 809-10, 291 P.2d 25;

People v. Medina (1975) 6 Cal.3d 484, 492, 492 P.2d 686, 99 Cal.Rptr. 630.

The "law of the case" cases cited by Appellant at pages 3-4 of its Jurisdictional Statement do not in the slightest conflict with the holding of the California Supreme Court that that doctrine is one of "procedure and not jurisdiction". (*England v. Hospital, etc., supra*, 14 Cal.2d 791, 795). Thus, while the decision of the District Court of Appeal may, indeed, be the law of the case as between Appellant and Appellee in Division Seven of the District Court of Appeal, Second Appellate District, it is not the *final judg-*

ment even of that court and certainly not of the highest court of the State of California.

It may also be noted that the California Supreme Court in *Atchison, Topeka and Santa Fe Railway Company v. Railroad Commission of the State of California* (1930) 209 Cal. 460 [affirmed (1931) 283 U.S. 380], said at page 472; "The doctrine of the law of the case applies only to the decision of the highest court on the particular issue under consideration. Where this issue involves the construction of the Constitution or statutes of the United States, the highest Court is the Supreme Court of the United States, and, hence, the doctrine of 'the law of the case' does not apply [even] to a decision of the state Supreme Court."

It is thus clear that there is no final judgment or decree of the highest court of California in which a decision could be had to give this Court jurisdiction to entertain Appellant's direct appeal.

The Case Does Not Come Within the *Cox Broadcasting* Exception.

Citing *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 and *Southland Corp. v. Keating*, ___ U.S. ___, 52 U.S.L.W. 4131, Appellant seeks to come within the fourth category of exceptions to the finality requirement set out in *Cox*. "Failure to accept jurisdiction at this juncture", Appellant asserts, "will 'seriously erode' fundamental federal policies". (Jurisdictional Statement, pp. 4-5).

However, the fact is that no federal policy will be eroded in the slightest by this Court's appropriate refusal to accept jurisdiction of Appellant's appeal at this time.

In its present posture, this case falls directly within the Court's opinion in *Flynt v. Ohio*, 451 U.S. 619 (1981), where the Court, accepting the premise of *Cox Broadcasting*, held that its refusal to accept jurisdiction would not

"seriously erode federal policy within the meaning of our prior cases" (451 U.S. at 622). Precisely the same is true here.

Appellant's claim is based upon its unsound theory of the application of the "law of the case" doctrine and its incorrect characterizations of the opinion of the Court below and the effect of its decision.

Appellant persists in asserting that the opinion below applies to "*any* nonprofit membership association" (Jurisdictional Statement, p. 11) and to "*All* private membership organizations in California" (*Id.* p. 4, emphasis ours). With that as a premise, Appellant proceeds to find a substantial constitutional problem involved and to raise the spectre of serious erosion of federal policy if this Court does not rush to assume jurisdiction.

However, the District Court of Appeal stated as clearly as possible that the Unruh Act *did not* apply to private clubs or organizations.

There is no federal policy which might be eroded, let alone "seriously", by the holding of the Court below (1), that by common law principles generally applicable within the state one may not be arbitrarily expelled from an organization whose membership requirements and rules and regulations he has not violated and (2), that an anti-discrimination statute, which embodies state policy similar to federal policy,[7] applies to an organization which is not private and which is encompassed within the language of the statute.

Appellant throughout proceeds on the *ipse dixit* that it is a private organization and that the decision of the District Court of Appeal applies to private organizations. Upon this

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[7]42 U.S.C. 2000a *et seq.*

groundless assumption it builds its claim that "failure to accept jurisdiction at this juncture, therefore, will 'seriously erode' fundamental federal policies". (Jurisdictional Statement, pp. 4-5).

Appellant insists that "all private membership organizations in California will have to operate in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt." (Jurisdictional Statement, p. 4). Leaving aside the question of whether the constitutionality of the California common law doctrine and the state's Unruh Act is in any, let alone serious, doubt, *no private* organization in California need operate "in the shadow" of the Unruh Act and no private organization in California need refrain from any action it may choose except such arbitrary action as violates an individual's basic right to fair dealing.

There is no federal policy which holds that an individual may be arbitrarily expelled from an organization of which he is a member, none of whose membership requirements or rules and regulations he has violated. Not even Mr. Justice Douglas' dictum in *Moose Lodge v. Irvis* (1972) 407 U.S. 163, 179-180, suggested that a white or black or brown or yellow, or Catholic or Jewish or agnostic club *could arbitrarily expel* a member who had met all membership requirements and who had not violated any rules of the organization.

In its "STATEMENT" Appellant asserts:

> "On Curran's appeal the Court of Appeal reversed. The court concluded that, simply because of its large membership, the Boy Scouts is 'open to and serving the general public' and is therefore, a 'business establishment' within the meaning of the Unruh Act. (App. 19a) It also ruled that the Unruh Act prohibits *any* nonprofit membership association from barring *any*

'class of persons' from membership in the exercise of the judgment that their admission would be inconsistent with the nature or purposes of the organization. (App. 20a) The court opined, therefore, that the Unruh Act prohibits the Boy Scouts (and other membership associations) from excluding homosexuals from membership (App. 21a)" (Jurisdictional Statement, p. 11, Emphasis Appellant's).

On this premise, Appellant proceeds to argue that "THE QUESTIONS ARE SUBSTANTIAL".

None of Appellant's statements about what the court "concluded," "ruled", or "opined" is correct.

First: The Court did not conclude that the Boy Scouts was open to and serving the general public and was therefore a business establishment, "*simply because of its large membership.*" Instead, the Court pointed out that it was necessary first "to determine the intended use of the word 'business' as used by the legislature" (Jurisdictional Statement, App. 13a); then to examine the California cases interpreting that language (*Id.* 14a-16a); then to determine "whether a group is private or public" (*Id.* 18a). Upon the basis of all that analysis, and without even mentioning the Boy Scouts' "large membership", let alone grounding its conclusion "simply" on such a fact, the Court concluded that Appellant fell within the ambit of the Unruh Act.

Second: The Court did not rule "that the Unruh Act prohibits *any* nonprofit association from barring *any* 'class of persons' from membership in the exercise of the judgment that their admission would be inconsistent with the nature or purposes of the organization". Its ruling applied not to "*any* nonprofit organization", but only to nonprofit organizations that *were not private* and came within the definition of the Unruh Act.

Third: The Court did not opine that the Unruh Act prohibits "other membership organizations" than the Boy Scouts "from excluding homosexuals from membership". Here, too, the Court's conclusion that "the Unruh Act prohibits arbitrary discrimination against homosexuals" (Jurisdictional Statement, App. 21a), similarly applies *only* to such "other membership organizations" as are not private and come within the definition of the Unruh Act.

Again, in the attempt to lean upon some fundamental federal policy which would be "seriously erode[d]" if the Court were not to act now, the Appellant states that,

> "[T]he California common law rule applied now prevents the Boy Scouts and other private membership organizations from excluding a person from membership unless the organization can first prove that particular conduct of that person actually would 'harm' the group. (App. 10a-11a) This test would, for example, prohibit a Jewish synagogue from excluding Christians from membership unless, because of some conduct, their presence would demonstrably 'harm' the congregation. The local Democratic Party could not exclude Republicans without shouldering a similar burden." (Jurisdictional Statement, p. 16).

Not at all. Neither the California common law rule applied by the Court below nor the Unruh Act test would prohibit a Jewish synagogue from excluding Christians from membership or the local Democratic Party from excluding Republicans without shouldering any burden whatever. The law applicable to such organizations is to be found in *Marina Point Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 743 which recognizes the right of "specialized institution[s] designed to meet a social need" to "promulgate reasonable . . . regulations that are rationally related to the services performed . . ." *In re Cox* (1970) 3 Cal.3d 205, 217.

Subject to the same basic error is Appellant's discussion of the "Absence of Compelling Interest" (Jurisdictional Statement, pp. 19-21).

Appellant asserts that a "governmental interest in ending 'discrimination' against homosexuals . . . would enable the States to require individual citizens to refrain from 'discrimination' even in inviting persons into their homes . . ." (Jurisdictional Statement, p. 19).

This is utter nonsense both as a general statement and as applied to the holdings of the Court below. Nothing in the opinion below or in any California case or statute contains or implies any such holding.

Appellant states that California's interest in preventing discrimination — which, it may be noted, includes preventing discrimination on the basis of sex, race, color, religion, ancestry or national origin, as well as sexual preference — is "weak indeed" (Jurisdictional Statement, p. 20), for Boy Scouts is a bona fide membership organization with a particular set of values and a specific educational purpose. (*Id.*).

The fact that it is a bona fide membership organization with a particular set of values and a specific educational purpose in no way imports that the decision of the Court below would in any way erode fundamental federal policy. On the contrary, the federal cases set out in footnote 1, *supra*, make clear that membership organizations such as YMCA, with "a particular set of values" similar to that claimed by Appellant, or such as Elks, with a claimed similar set of values applicable to adults, and others like them, are equally subject to the federal anti-discrimination policy set out in 42 U.S.C. 2000a *et seq.* (We do not here comment on the "particular set of values" which Appellant asserts as permitting it to be "free to associate itself with, and

disassociate itself from, whomever it may choose." App.)

Appellant similarly misstates the effect of the Court's decision when it says (Jurisdictional Statement, p. 21), "The State, according to the Court below, may prohibit all membership criteria based on any 'classifications' of people", and this "presumptively outlaws all ethnic, religious, hereditary or professional associations and societies unless they prove that the 'conduct' of 'outsiders' would demonstrably 'harm' their organizations". But the Court below held only that organizations *which are not private* may not establish individual membership criteria which are outlawed by the Unruh Civil Rights Act. That and no more.

The same misstatement of the Court's ruling may be found at page 24 of the Jurisdictional Statement in Appellant's stricture about "California's application of its common law rule to *any* (emphasis Appellant's) private membership groups . . .".

The matter of whether or not the Boy Scouts or other organizations chartered by Congress may exclude persons from membership on the basis of sex (Jurisdictional Statement, pp. 22 and 25) was not before the Court below nor considered or decided by it.

The blunderbuss charge, made at the conclusion of Appellant's Jurisdictional Statement (p. 25) in connection with its assertion that this case presents an important Supremacy Clause issue, in that "if the decision below is allowed to stand it would allow the State to force the restructuring of those congressionally chartered associations as well" is utterly without merit. Each one of the organizations set out there must be considered in the light of its purposes or its membership requirements, or both, as set down in each Act of Congress creating it. None of them was involved in this case. All that was involved was the Boy Scouts of America

as created by its own Act of Congress, none of the terms of whose charter in any way inhibited the application to Appellant of this state's anti-discrimination law.

Finally, we must take exception to the grossly misleading implication in Appellant's adroitly worded statement with regard to the *Schwenk* case in Oregon. Appellant states (Jurisdictional Statement, p. 24),

> "In Oregon, for example, faced with the same federal constitutional concerns brushed aside (sic) by the California court, the Supreme Court of Oregon interpreted its public accommodations statute as inapplicable to the Boy Scouts' membership policies. *Schwenk v. Boy Scouts of America*, 551 P.2d 465 (Or. 1976)."

The fact is that there is not a single word in the decision of the Oregon Supreme Court which even mentions the "federal constitutional concerns" to which Appellant refers. That case was decided on one basis and one basis only, namely that the legislative history of the Oregon statute established to the Court's satisfaction that the legislature did not intend to include the Boy Scouts within its scope.

Conclusion.

The motion to dismiss the appeal should be granted.

Dated: April 13, 1984.

Respectfully submitted,

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Timothy Curran.

APPENDIX.

Amended Complaint and Petition for Writ of Mandate, and for Preliminary and Final Injunction.

Superior Court of California, County of Los Angeles.

Timothy Curran, et al., Plaintiff-Petitioner, vs. Mount Diablo Council of the Boy Scouts of America, Defendant-Respondent. No. C 365 529.

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AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff, TIMOTHY CURRAN, is a resident of Los Angeles County.

2. Defendant, MOUNT DIABLO COUNCIL, BOY SCOUTS OF AMERICA (hereafter "Mt. Diablo Council"), is a part of Boy Scouts of America, an organization created pursuant to 36 U.S.C.A. 21-29.

3. For over five years immediately prior to November 28, 1980, plaintiff was a member in good standing of Troop 37, Berkeley, California, of the Mt. Diablo Council and had attained the rank of Eagle Scout. Prior to November 28, 1980, plaintiff's Scoutmaster had forwarded to Mt. Diablo Council an application requesting that the Council approve plaintiff as a "Scouter" in order that plaintiff might assist the Scoutmaster in a leadership capacity. "Scouters" are members of Boy Scouts of America. Such applications are uniformly automatically approved for those who have

attained the rank of Eagle Scout.

4. On or about October 6, 1980, one Quentin Alexander (hereafter "Alexander"), Scout Executive of Mt. Diablo Council and authorized and empowered to act on its behalf, informed plaintiff that he was advised that plaintiff was a homosexual and thus was ineligible for "Scouter" status.

5. On November 28, 1980, plaintiff met with Alexander and was told by Alexander, acting on behalf of Mt. Diablo Council, that because he was a homosexual and thus not a good moral example for younger Scouts, he was no longer a member of the Boy Scouts of America and could not have "Scouter" status.

6. Prior to his expulsion from Boy Scouts of America, as set forth in paragraph 5 hereof, plaintiff was not informed that a requirement of membership in Boy Scouts of America was that one not be a homosexual or that homosexuality was a reason for terminating one's membership. In fact, there is no such membership requirement. Plaintiff was not given any opportunity, before being expelled, to present evidence to Mt. Diablo Council that there was in fact no such membership requirement. Plaintiff was not informed, prior to the meeting set forth in paragraph 5 hereof that he was deemed not to be a good moral example for younger Scouts and that this would be a basis for his expulsion from membership in Boy Scouts of America. At said meeting at which he was expelled, plaintiff was not given any opportunity to offer proof that his conduct as a Scout and as a human being, with or without reference to his sexual preference, had established, and would continue to demonstrate, that he was a good moral example for younger Scouts and that he was, in every way, trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean and reverent and that he had done and intended on his honor in the future to do his best to do his duty to God

and his country and to obey the Scout Law and to help all other people at all times and to keep himself physically strong, mentally awake and morally straight. ["Morally Straight — You live and act and speak in ways that mark you as a boy who will grow up to be a man of good character. You are honest, clean in speech and actions, thoughtful of the rights of others, and faithful to your religious beliefs." — Scout Handbook, Boy Scouts of America, Eighth Ed. Pg. 37.]

7. Prior to his expulsion, plaintiff was given no opportunity to know who, other than Alexander, alleged that a membership requirement of Boy Scouts of America was that a member must not be a homosexual, nor to cross-examine said Alexander or any other person so alleging, nor an opportunity to present evidence that there was no such membership requirement. Prior to said expulsion, plaintiff was given no opportunity to know who, other than Alexander alleged that he was not, or would not be, a good moral example for younger Scouts and was not given any opportunity to cross-examine Alexander or any other person so alleging. Plaintiff is, and always has been, a good moral example for younger Scouts.

8. At the meeting referred to in paragraph 5 herein, plaintiff was also informed by Alexander, acting on behalf of Mt. Diablo Council, that it was the policy of Mt. Diablo Council not to permit atheists to be members of Boy Scouts of America. Based thereon, it is plaintiff's belief, that one of the bases for his expulsion by Mt. Diablo Council from membership in Boy Scouts of America was the belief that plaintiff is an atheist. Plaintiff is not an atheist. Prior to his expulsion, plaintiff was not given an opportunity to know who, other than Alexander, alleged that he was an atheist or to cross-examine Alexander or any person so alleging, or to present proof that he was not an atheist.

9. After being expelled by Mt. Diablo Council from Boy Scouts of America, plaintiff made written request to Western Region of Boy Scouts of America, of which Mt. Diablo Council is a subordinate body, for administrative review of the decision of Mt. Diablo Council. The reply of Western Region, by its attorneys, is attached hereto as Exhibit A. Said reply made clear that any such review would be a futile exercise since plaintiff did not propose to prove that the only fact that he had previously had an opportunity to provide, namely, that he was a homosexual, was untrue. No other administrative remedy is or was available to plaintiff and, as a consequence thereof, all administrative remedies have been exhausted.

10. Membership in Boy Scouts of America is of considerable financial value to members. It permits members, and only members, to wear the Boy Scout uniform and thus to be recognized by this means alone, by non-members as well as other members, as one who belongs to an organization generally held in high regard. Membership in Boy Scouts of America gives a member greater access to, and opportunity for, employment. Membership in Boy Scouts of America, and particularly holding the position of "Scouter", is a valuable asset in application for admission to institutions of higher learning, and to graduate schools leading to professions, and is a favorable factor in the consideration of such an application by admissions officers or committees of such institutions. Membership in Boy Scouts of America in a position of leadership such as "Scouter" is a valuable financial asset in that it is often a factor in one's employment and advancement in employment in the business world and results in higher financial reward to such an individual than he would otherwise receive.

11. The action of Mt. Diablo Council in expelling plaintiff from membership in Boy Scouts of America and in

denying him the opportunity to be a "Scouter" was arbitrary, capricious, unreasonable and contrary to law in that, as set out above, plaintiff was not given notice of the charges against him and was not given an opportunity to examine and refute the alleged evidence against him, and was expelled from membership without any basis for such expulsion.

FOR A SECOND CAUSE OF ACTION FOR VIOLATION OF CIVIL CODE SECTION 51, THE "UNRUH CIVIL RIGHTS ACT".

12. Plaintiff repeats each and every allegation set forth in paragraphs 1 through 11 with the same force and effect as if set forth here[illegible] length.

13. Boy Scouts of America is the owner of the copyright on the Boy Scouts emblem and the Boy Scouts uniform. Boy Scouts of America franchises, to retail chains, department stores and other retail outlets and business establishments throughout the United States, the sale of the Boy Scouts uniform, the Boy Scouts emblem and a wide range of materials and equipment bearing the Boy Scouts emblem. Included among such materials and equipment are ties, caps, shorts, belts, buckles, kerchiefs (hand and neck), canteens, vitt'l kits and litt'l vitt'l kits, model racing cars, berets, compasses, grooming kits, nail clippers and comb packets, space derby toys, regatta model kits, cooking kits. Boy Scouts of America derives great financial revenue from said franchises. The Boy Scouts of America buys from various suppliers many articles such as those set forth above, as well as others, running into millions of dollars per year, and sells the same to retail outlets, such as those set forth above, at a profit and derives great financial revenue from such transactions. The Boy Scouts of America maintains a large buying and sales force in connection with the matters

set forth in this paragraph.

14. Boy Scouts of America is engaged in the book publishing business and publishes and sells throughout the nation a vast variety of books of which it is the copyright owner. Among such books are: Bear Cub Scout Book, Webelos Scout Book, Troop Committee Guide Book, Wolf Cub Scout Book, Patrol and Leadership, Scoutmaster's Handbook, Staging Den and Pack Ceremonies, Scout Handbook, Troop Committee Guidebook, Webelos Den Leader's Book, Leadership Corps, as well as books on Geology, Surveying, Personal Fitness, Sports, Machinery, Metals Engineering, Salesmanship, Journalism. Boy Scouts of America derives great financial revenue from said publishing business.

15. Boy Scouts of America and Mt. Diablo Council, as a part of Boy Scouts of America, are business establishments.

16. The Mt. Diablo Council maintains, and has maintained for many years, a shop in Walnut Creek, California, where it engages in the retail sale to the public of a variety of different items. Among the items on sale in said shop are the following, representing but a sampling of the stock of said retail store:

—Mt. Diablo Council Mugs
—Miniature Flags, BSA and USA
—Various awards
—Scout charms for bracelets
—Scout Handbooks
—Scout Fieldbooks
—Scoutmaster Handbooks
—Cub Scout Magic book
—Craft & Games idea books
—Space Derby woodcarving-craft set
—Pinewood Derby woodcarving-craft set
—Beginner's compass
—Campaign Hats
—American Flag patches
—Leather belts
—Scouts pens
—Mr. Diabo Council T-shirts

Purchasing for this store is done by the Mt. Diablo Council

acting through its agents and employees. The Mt. Diablo Council employs sales people in said store. The goods and books sold in the store are sold at prices over and above their cost to Mt. Diablo Council, which prices are designed and aimed to bring to Mt. Diablo Council essentially the same amount of profits on its sales as would be made by any similar retail establishment selling the same type of goods to the general public.

17. Mt. Diablo Council is a business establishment.

18. Homosexuals and heterosexuals alike in California are entitled to the full and equal advantages, facilities, privileges or services in all business establishments of every kind whatsoever.

19. By expelling plaintiff from membership in Boy Scouts of America on the ground that he is a homosexual, Mt. Diablo Council has denied plaintiff the full and equal advantages, facilities, privileges and services of and in Mt. Diablo Council. Said denial was arbitrary, unreasonable and capricious and in violation of Section 51 of the California Civil Code.

WHEREFORE, plaintiff respectfully requests:

(1) That this Court issue a writ of mandate requiring Mt. Diablo Council to reinstate petitioner as a member of the Boy Scouts of America and to allow him status as a "Scouter" or, in the alternative, to show cause at trial why petitioner should not be so reinstated as a member of Boy Scouts of America and allowed said status as a "Scouter";

(2) That the Court issue a preliminary injunction and a permanent injunction enjoining respondent from interfering with petitioner's rights under the Unruh Civil Rights Act and directing respondent to reinstate petitioner as a member of the Boy Scouts of America and to allow him the status of "Scouter";

(3) For damages for violation of his rights under the Unruh Civil Rights Act, as the proof may show but in no event less than Two Hundred Fifty ($250.00) Dollars;

(4) For attorney's fees and costs;

(5) For such other and further relief as to the Court may seem just and proper.

DATED: August 5, 1981.

FRED OKRAND
SUSAN McGREIVY
BARRY COPILOW
GEORGE SLAFF
By/s/ George Slaff
GEORGE SLAFF, Attorneys for
Plaintiff TIMOTHY CURRAN

EXHIBIT A

[LETTERHEAD]

March 13, 1981

Barry L. Copilow, Esq.
Suite 215
8383 Wilshire Boulevard
Beverly Hills, CA 90211

Dear Mr. Copilow:

The issues of Mr. Timothy A. Curran's application to participate as a journalist on the 1981 National Jamboree *Journal* and of his continued association with the Boy Scouts of America have been referred to this office. I have been informed that you will be representing Mr. Curran in any further proceedings.

On February 14, 1981, by a letter addressed to Mr. Richard Harrington, Mr. Curran personally requested to have a hearing held in order to appeal the decision of the Mt. Diablo Council denying his application to participate as a journalist on the 1981 National Jamboree *Journal*. If Mr. Curran still wishes a hearing, Boy Scouts is willing to conduct one.

The holding of such a hearing, however, is unnecessary unless Mr. Curran believes that there is some misunderstanding of underlying facts. Boy Scouts is a private membership organization free to associate itself with, and to disassociate itself from, whomever it may choose. On the basis of facts provided by Mr. Curran, Boy Scouts has decided not to continue its association with him. Only if he now contends, and hopes to prove, that the facts previously provided by him are untrue could a hearing be productive. If that is what Mr. Curran seeks to accomplish, please contact me to initiate the Boy Scouts' appellate procedure.

Yours truly,

/s/ Malcolm E. Wheeler
Malcolm E. Wheeler

MEW:dg